

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

KELLI SMITH, et al.,

Plaintiffs,

-vs-

MERCK & CO., INC., et al.,

Defendants.

CIVIL ACTION NUMBER:

3:13-cv-02970-MAS-LHG

**FINAL APPROVAL/
FAIRNESS HEARING**

Clarkson S. Fisher United States Courthouse
 402 East State Street
 Trenton, New Jersey 08608
 December 3, 2019

B E F O R E: HONORABLE MICHAEL A. SHIPP
 UNITED STATES DISTRICT JUDGE

A P P E A R A N C E S:

SANFORD, HEISLER & SHARP, LLC.
 BY: RUSSELL KORNBLITH, ESQUIRE
 and
 NICOLE WIITALA, ESQUIRE
 On behalf of the Plaintiffs.

MORGAN LEWIS & BOCKIUS, LLP
 BY: KRISSY A. KATZENSTEIN, ESQUIRE
 MICHAEL S. BURKHARDT, ESQUIRE
 and
 ALI M. KLIMENT, ESQUIRE
 On behalf of the Defendants.

Cathy J. Ford, Official Court Reporter
 cfordccr@gmail.com
 609.367.2777

Proceedings recorded by mechanical stenography; transcript
 produced by computer-aided transcription.

1 THE DEPUTY COURT CLERK: All rise.

2 (PROCEEDINGS held in open court before The Honorable
3 Michael A. Shipp, United States District Judge, at 11:01 a.m.)

4 THE COURT: Please be seated. Good morning.

5 ALL COUNSEL: Good morning.

6 THE COURT: We are here today and on the record in
7 the matter of Smith v. Merck, et al., Docket Number 13-2970.

8 May I have appearances of counsel, please.

9 MR. KORNBLITH: Yes, your Honor.

10 Russell Kornblith, Sanford, Heisler & Sharp for the
11 plaintiffs, here with Nicole Wiitala and Kelli Smith.

12 MS. KATENSTEIN: Good morning, your Honor.

13 Krissy Katenstein with Morgan Lewis on behalf of the
14 defendants. I'm here with my colleagues, Michael Burkhardt
15 and Ali Kliment, from Morgan Lewis and in-house counsel at
16 Merck, Nicole Stovall.

17 THE COURT: Good morning to you folks as well.

18 So, on July 19, 2019, the Court granted preliminary
19 approval of the class action settlement. We are here today
20 for a final hearing on the fairness, reasonableness, and
21 adequacy of the settlement reached between the defendants and
22 the class representatives, Kelli Smith, Kandice Bross, Rachel
23 Mountis, and Kate Whitmer through counsel.

24 Also, pending before the Court is plaintiffs' motion
25 for attorneys' fees, expenses, and service awards.

1 Even though the notice was required from any class
2 member who intended to make an appearance at today's hearing,
3 and the Court did not receive any notice of any intention to
4 appear, if there are any class members who are present here
5 today, I'll also allow you the opportunity to speak, in favor
6 or against the class settlement. So I'm not sure if there
7 will be anyone here.

8 The Court will hear from class counsel on class
9 certification, certification of the Equal Pay Act collective
10 action, and the fairness of the settlement.

11 The Court will then hear from the class
12 representative and defense counsel, as well as any objectors.
13 I'll then turn to class counsel for their motion for
14 attorneys' fees and costs.

15 So, I'll begin by asking class counsel to
16 specifically address why this Court should first officially
17 certify the class under Rule 23, and then, second, certify the
18 Equal Pay Act collective action, and then, third, approve the
19 proposed settlement.

20 So I'm going to allow you to place the -- place on
21 the record the terms of the settlement agreement, the notice
22 that was sent to class members, the response provided by class
23 members, and anything else you believe that the Court ought to
24 know.

25 So, Mr. Kornblith, if you want to go ahead and take

1 the lead on this.

2 MR. KORNBLITH: Yes, your Honor.

3 Good morning, your Honor, and thank you for hearing
4 us this morning.

5 The settlement before us today would provide \$6.2
6 million in relief to 2,900 class members. These class members
7 are women who were sales representatives at Merck in a variety
8 of roles from late 2010 until October of 2018.

9 This settlement is the product of more than five
10 years of litigation entailing, on the plaintiffs' side alone,
11 more than 23,000 hours of attorney time, hundreds of hours of
12 the named plaintiffs' time, and, ultimately, an arm's length
13 mediation that resulted in the settlement that we have today.

14 No class member has objected to the settlement. Only
15 18 class members, which is less than 1 percent, it's about
16 .6 percent, have opted out of the settlement. And of those,
17 none have expressed any disappointment with the settlement
18 that was achieved.

19 In addition, the defense counsel has notified the
20 State's Attorney General of the settlement per the Class
21 Action Fairness Act and no State Attorney General has sought
22 any further inquiry from defense counsel.

23 In this Circuit, there is a presumption of fairness
24 in a settlement when four factors are met. The first of those
25 factors is that the settlement negotiations were conducted at

1 arm's length; the second is that there was sufficient
2 discovery; the third is that class counsel is experienced in
3 similar litigation; and the fourth is that only a small
4 fraction of the class objected.

5 Here, the case resolved through mediation, after
6 several attempts at negotiations over the course of this
7 five-year litigation, and the mediator was Mark Rudy of Rudy,
8 Exelrod in San Francisco, he's a very respected class action
9 mediator. In fact, a former plaintiff's employment lawyer.
10 He was deposed by defense counsel, and plaintiff counsel
11 accepted him as a mediator. He was actively involved in the
12 settlement negotiations, which were conducted over a full day,
13 in 2018, on October 1st.

14 Second, this case has been litigated very heavily by
15 class counsel, who are experienced in this kind of litigation,
16 on both sides. There have been over 90 depositions in this
17 case, including the depositions of the four-named plaintiffs,
18 the depositions of 66 opt-in plaintiffs scattered across the
19 country, the depositions of four experts, all of whom are very
20 experienced in this kind of litigation, the depositions of 16
21 facts witnesses for Merck and numerous Rule 30(b)(6) witnesses
22 for the three Merck entities. There's been written discovery
23 conducted on a total of 120 opt-in plaintiffs, in addition to
24 our named plaintiffs, and, of course, substantial document
25 production from Merck. There are, at this time, five pending

1 motions in this case, each of which has entailed substantial
2 work by the counsel on both sides, the largest being
3 plaintiffs' motion for certification of the Rule 23 class and
4 for the EPA collective action.

5 There is also brought by defendants, a motion to
6 strike certain declarations that the plaintiffs have filed; a
7 Daubert motion filed against plaintiffs' labor economist,
8 Dr. Vekker; a separate Daubert motion filed against
9 plaintiffs' IO expert, Dr. David Friedland; and a motion for
10 summary judgment based on the failure of, in defendants' view,
11 the Rule 23 motion for class certification to conform to
12 theories articulated in the EEOC charges. Both sides face
13 considerable litigation risks from these motions and that was
14 one of the factors that both sides considered in bringing
15 about the settlement that we have today.

16 We are all aware that even if a class -- if a class
17 is certified or if a class is denied, an appeal is likely down
18 the road, and so both parties face the long road of litigation
19 in the absence of a settlement.

20 With regard to class counsel, your Honor has seen the
21 papers submitted by both parties. Our firm is very
22 experienced in employment class actions and in discrimination
23 class actions, in particular. We have the largest Title VII
24 verdict ever was brought against a pharmaceutical company; and
25 the defense counsel, obviously, are very experienced also. We

1 can be assured that no stone has been left unturned here in
2 the discovery and the litigation of this action.

3 With regard to the final factor, there are no
4 objectors in this case. Both parties, their counsels, and as
5 we have heard from class members, every member of the class
6 that we have heard from wants this settlement to be approved.
7 Accordingly, we respectfully ask that the Court approve the
8 settlement and allow the class members to receive the relief
9 that's been agreed upon.

10 THE COURT: I did have one question about the cy pres
11 recipient.

12 MR. KORNBLITH: Yes, your Honor.

13 THE COURT: How did you come to this particular cy
14 pres organization?

15 MR. KORNBLITH: So we have two cy pres recipients. I
16 believe it's the Employment Center -- the Employee Rights
17 Advocacy Institute For Law and Policy, which is a nonprofit
18 dedicating to helping employees advocate for their rights in
19 the workplace. And since this is a discrimination case, we
20 believed it was an appropriate recipient of some of the cy
21 pres funds. The other is the Impact Fund, which is dedicated
22 to impact litigation to bring about change.

23 And so again, because this is a class action case
24 aimed at discrimination in the workplace, we believe it would
25 be an appropriate cy pres recipient.

1 THE COURT: And I ask, because I always get concerned
2 when I have cases that are brought against New Jersey
3 companies that are litigated in the New Jersey courts and then
4 a cy pres ends up being an organization out in California.
5 That concerns me because, I believe, there are organizations
6 that are located in this particular general area of the
7 country that are doing the same kinds of functions that the
8 organization that you're ultimately selecting here would be
9 doing that might also be, I guess, worthy recipients of this
10 kind of cy pres award.

11 Have you considered companies and groups and advocacy
12 institutes out in this area?

13 MR. KORNBLITH: Your Honor, I don't know that we
14 considered any New Jersey specific organization in this case,
15 but I would say that this is a nationwide class action. And
16 although, the --

17 THE COURT: It's a nationwide class action but the
18 majority of the employees that Merck has are situated on the
19 East Coast, correct?

20 MR. KORNBLITH: Well, your Honor, this is a case
21 brought on behalf of sales representatives, so there --

22 THE COURT: Are any of their sales reps are located
23 on the East Coast, correct?

24 MR. KORNBLITH: I would defer to defense counsel on
25 the locations of where exactly the sales reps are, but our

1 class was diverse across the nation, and I wouldn't say it was
2 weighted heavily towards the East Coast.

3 As the Court may have seen from the signature pages
4 on the plaintiffs' declarations, although Ms. Smith is based
5 in New Jersey, Ms. Bross is in Pennsylvania, Ms. Whitmer is in
6 the Los Angeles area, and Ms. Mountis worked in the Los
7 Angeles area and now works in the South Carolina area. And so
8 we really have a broad cross-section of people across the
9 nation here.

10 THE COURT: Counsel, that may very well be, but I
11 think -- I'm concerned. I'm just letting you know that I'm
12 concerned. That's the one aspect of this whole thing that I
13 did not like, because it just kind of felt like there were
14 areas and there are organizations that are located over here.
15 Clearly, this litigation has weighed in this Court for almost
16 six years in the District of New Jersey. You're looking at a
17 company that has its national headquarters here in New Jersey,
18 and, yet, still, it would seem like a cy pres recipient from,
19 not only not Pennsylvania, not New York, but all the way on
20 the other side of the country, seems like there are other
21 entities that might be doing similar work locally. But it's
22 not something for which I believe that we ought to hold up any
23 kind of resolution, but I wanted to let you know that I didn't
24 particularly find that appealing when I looked at this whole
25 agreement here.

1 Okay. That's all I have for you. Thank you.

2 MR. KORNBLITH: Thank you, your Honor.

3 THE COURT: From defense counsel, let me hear from
4 you.

5 On behalf of the defendants, first and foremost, do
6 you have full settlement authority to settle this matter.

7 MS. KATENSTEIN: Yes, your Honor, we do have full
8 settlement authority.

9 THE COURT: And on behalf of your client, do you
10 approve of the settlement and agree with the terms that have
11 been set forth by plaintiffs' counsel?

12 MS. KATENSTEIN: Yes, your Honor. We agree that they
13 are fair terms.

14 THE COURT: And are you satisfied that all of your
15 clients' concerns have been addressed?

16 MS. KATENSTEIN: Yes, your Honor.

17 THE COURT: Okay. Anything else you want to put on
18 the record?

19 MS. KATENSTEIN: Your Honor, I would just agree with
20 Mr. Kornblith that this was a heavily contested case with
21 extensive litigation, over five plus years, as he said, with
22 the opportunity for both parties to assess both the likelihood
23 of class certification and the merits of the case; and through
24 an arm's length negotiation did arrive at this settlement with
25 both parties believing that it is fair and equitable to both

1 sides.

2 And I think one thing that defendant would just note
3 is that pursuant to Rule 23 in the Supreme Court's decision in
4 *Amchem v. Windsor*, the Court is not required to find
5 superiority when ruling on a final settlement. So there is no
6 need to determine whether this is in fact the most manageable
7 way for proceeding. That would only be if the case were going
8 through class certification in the ordinary course that
9 plaintiffs would be required to show manageability, which, as
10 was laid out in defendants' original class certification
11 papers, defendants don't believe they would be able to do.
12 But in the settlement context, it is not a necessary showing.

13 Thank you, your Honor.

14 THE COURT: Okay. Let me hear now from the class
15 rep, Ms. Smith.

16 Gina, can you administer the oath, please.

17 THE COURT: You can remain seated. You don't have to
18 take the witness stand.

19 Mr. Kornblith, I'm going to ask you to do the
20 questioning.

21 MR. KORNBLITH: Yes, your Honor.

22 KELLI SMITH, PLAINTIFF, SWORN.

23 THE DEPUTY COURT CLERK: Please state your name for
24 the record and spell your last name.

25 MS. SMITH: Kelli Smith, S-M-I-T-H.

1 THE COURT: And Ms. Smith, you can be seated. I'm
2 going to ask you to keep your voice up and speak directly into
3 the microphone. I'm going to ask your attorney to go through
4 some necessary questions related to the proposed settlement
5 and your representation of the class and the amount that
6 you're receiving as a result of being a class rep. I'll use
7 your answers to determine the fairness and reasonableness and
8 appropriateness of the proposed settlement.

9 So, with that, Mr. Kornblith, I'm going to turn it
10 over to you.

11 MR. KORNBLITH: Yes, your Honor. And I would add, if
12 there are specific questions that I do or don't ask that the
13 Court would like to hear an answer, the Court is of course
14 welcome to interpose them.

15 BY MR. KORNBLITH:

16 Q. Ms. Smith, good morning.

17 A. Good morning.

18 Q. Thank you for being here today.

19 As you understand, we're here in a final fairness hearing
20 on claims that you brought against Merck.

21 Do you understand that?

22 A. Yes.

23 Q. And I take it you were at one point employed by Merck.
24 Yes?

25 A. Yes.

1 Q. Okay. How did you come to be employed at Merck?

2 A. I interviewed with them in 2004, I believe. I'm sorry.
3 Yes, 2004. I was a head hunter prior to that, and I had the
4 experience of knowing a lot about the pharmaceutical industry.
5 I thought they were a very reputable company, and they were
6 known to be first in class in product and that's the company I
7 wanted to strive to work for.

8 Q. And you came to eventually bring litigation against
9 Merck?

10 A. Correct.

11 Q. What is the general nature of the claims that you brought
12 against Merck?

13 A. Individually, I brought a class of claims of retaliation,
14 as well as having to leave due to the circumstances.

15 Q. And what about on behalf of the class that are here?

16 A. It was mainly due to discrimination on pregnancy, as well
17 as payment issues based on tiering.

18 Q. Okay. Why did you come to believe that you were
19 experiencing gender discrimination at Merck?

20 A. It wasn't one reason. There were a variety of reasons.
21 It just kept on adding to it. It started when I sat down with
22 my peers, both men who were at the same level as I was but
23 receiving distinct higher increases, significantly higher
24 increases, as well as telling us that they were receiving
25 14 percent increases versus our 1 to 2 in some cases where my

1 colleagues were receiving zero, the difference was that I was
2 ranked Number 1 in the company. My competencies were rated as
3 being great. So I knew something was up because we were mere
4 images within a territory, so that was kind of when I
5 thought -- when I came back from maternity leave, we were told
6 we were being placed in these new positions specifically on
7 our competencies, nothing else. Because there was a merger
8 between our companies, Schering-Plough and Merck.

9 My competencies for 2010 said that I had exemplified what
10 great looks like to the region, not just to the district, but
11 to the region, which is what you strive to do. I was used as
12 an example time and time again.

13 So when I was asked why I was placed at the lowest tier
14 because of my competencies, the rationale I was given was
15 because it was the timing of me having a baby. I questioned
16 that. I said, are you saying the timing of me having a baby
17 is why I was placed ...? Yes, it all came down to timing. I
18 said, I beg you -- this is my district manager -- you have to
19 give me something more because I knew that that just didn't
20 sound right. Was it based on anything I wasn't doing out in
21 the field? Was it based on my skill sets? No, keep doing
22 what you're doing. You're great. I know I'm going to eat
23 crow on this one. Keep doing what you're doing.

24 So I said, with all due respect, I need to inquire about
25 this. I have to find out more as to why I'm getting placed at

1 the lowest tier. Nothing. Keep doing what you're doing.

2 You're the example of what great looks like.

3 I then pursued it with my regional manager. I then
4 pursued it with HR. And in each instance, I said, please give
5 me something to say I approved upon. Nobody could help me. I
6 went to our ombudsman. And as this progressed, I found
7 that -- I was basically being watched over. I would -- the
8 ombudsman started to come to the meetings. There would be
9 hundreds of reps there and the ombudsman would sit at my
10 table. They would go to the lunch table where I would sit.
11 They would sit in my room.

12 Then we went to a team building event, and the HR person
13 that was -- not only my representative -- all the woman that
14 had complained about our manager, our regional manager while
15 they were on maternity leave, it was their representative as
16 well, and she happened to be on the same curling team, which
17 is equivalent to a two-lane bowling room with a bar at the end
18 of it. And the HR person was on the curling team with my
19 manager. I said, this is not right. You know, there's
20 definitely a conflict of interest.

21 Q. Let me ask you, you mentioned having a baby. How old is
22 that child today?

23 A. He'll be 10 in March.

24 Q. And so, around that time, when did you -- or, excuse me,
25 when did you engage an attorney here?

1 A. I engaged an attorney in 2000 -- it was either the end of
2 2010 or 2011, right at the beginning.

3 Q. Okay. What was the first step that you took -- first,
4 let me ask you, how did you choose Sanford Heisler Sharp as
5 your attorneys in this case?

6 A. I did some research. First, I went to friends of family
7 that were attorneys and asked them what they thought.
8 Everybody stood by my side and said that this is no-brainer,
9 and that was part of everything we had heard that was going on
10 from the harassment that was happening to women within our
11 region, being called -- pardon my language -- being called
12 whores, being put in a position to play beer pong, where they
13 were trying to get the ping pong ball into the -- I asked
14 around a lot. And then when I researched discrimination in
15 pharmaceutical sales with attorneys, I came across Sanford
16 Heisler.

17 Q. Okay. And so, what was the first step you took after
18 engaging counsel in pursuing this case?

19 A. I contacted them through the website. And shortly after
20 I received a call from David Sanford, who said that he wanted
21 to hear more. And after a lot of dialog, he very politely
22 said, you know what, I get a ton of these every day. He said,
23 I get hundreds of these, and I never call. He said, it's very
24 rare that I call. He said, I think this is something we need
25 to pursue.

1 Q. Did there come a time where you filed an EEOC charge in
2 this case?

3 A. Yes.

4 Q. How much time would you say you spent in preparing to
5 file that?

6 A. That was very time consuming, because we had to dig up a
7 lot of the paperwork and policies and procedures from Merck,
8 feedback that came from my colleagues. So 50 hours, maybe.
9 It's tough to say 10 years later, 11 years later.

10 Q. And what's the next major step in this litigation you
11 recall after filing that EEOC charge?

12 A. After that was the mediation, which happened well over a
13 year after.

14 Q. And that mediation was conducted for you alone?

15 A. Correct. Merck was there.

16 Q. And did the case resolve at that mediation?

17 A. No.

18 Q. What happened after the mediation in your pursuit of this
19 case?

20 A. After the mediation, we had to file an amendment, I
21 believe. I think --

22 Q. Did you file a case in court?

23 A. We did.

24 Q. And tell me about the considerations for you that went
25 into filing a case in court?

1 A. So this was really hard because I knew that this was
2 affecting the bigger picture of my colleagues. I knew it
3 wasn't just me that was going through this, but everybody was
4 very scared to speak up. The woman, who was sexually harassed
5 in a bar, would not speak up for herself because she was
6 scared to lose her job, and I was looked at as a leader in
7 this company because I was looked at as a leader to my peers.

8 So my big consideration was, what do I tell my children?
9 When I spoke to my own mother, she said, this is corporate
10 America. You need that. I said, well, that's not right.
11 It's not the right thing to do. It's not -- what am I going
12 to tell my own daughter? Am I going to tell her it's the
13 right thing to do. Am I going to tell my son that that's
14 okay. And so I came to grasp -- I had long conversations with
15 my husband saying, I don't know if I can go to sleep at night
16 knowing that I just walked away from doing the right thing.
17 And so I filed, and I knew it was going to get publicity. I
18 knew it was going to affect my family. But I didn't know the
19 exact ... (Witness crying).

20 Q. Are you okay?

21 After you filed the complaint, what's the next
22 significant step you recall in this litigation?

23 A. That was the amendment.

24 Q. Tell me about that process?

25 A. Again, a lot of paperwork, reviewing procedures,

1 preparing for the next steps, documentation from Merck. It
2 took a good, another, I don't know, 5 to 10 hours reviewing
3 and going over it all.

4 Q. And after you filed the amended complaint, what's the
5 next big step you recall in this case?

6 A. I can't really remember. I'm sorry.

7 Q. Do you recall Merck filing a motion to dismiss in this
8 case?

9 A. Yes, Merck filed a motion to dismiss.

10 Q. And what do you recall about that?

11 A. I remember being very upset because I thought, you know
12 it's true and how can this happen. But it fired me up a lot
13 to say that we need to fight harder, and we need to do the
14 right thing.

15 Q. And after Merck filed the motion to dismiss, what's the
16 next major step that you recall in this case?

17 A. At that point, I believe we had to turn in all of our
18 phone records and everything. Correct?

19 Q. Right. So you said you turned over your phone records.
20 Do you recall any other involvement in the discovery process
21 here?

22 A. The discovery process was not only turning over my phone
23 records but all my email records, my email accounts. My
24 husband's phone had to get turned over because I once used his
25 phone, so years of his own personal information came about.

1 My personal journals had to get put into play. So it was very
2 invasive.

3 Q. Okay. How much time would you say you spent in that
4 process?

5 A. That was quite tedious. So, 30 to 40 hours probably.

6 Q. Okay. Did there come a time where you sat for a
7 deposition in this case?

8 A. Yes.

9 Q. Do you recall who deposed you?

10 A. Yes, Michael Burkhardt.

11 Q. Can you tell me a little bit about the process of
12 preparing for your deposition. Did you meet with counsel?

13 A. Met with counsel, spoke with counsel regularly on the
14 phone. There were many hours involved with that. Making sure
15 we reviewed pretty much all the documents that came forward.
16 We couldn't possibly have all because there's emails from
17 years ago and a lot of people involved. But there were
18 definitely many hours put into that preparation.

19 Q. And the deposition, itself, what do you recall about how
20 that affected you emotionally?

21 A. That was an awful experience because you knew that every
22 answer that you put out there, the role of the defense
23 attorney is to prove you wrong, so no matter what you say,
24 whether how truthful it is, how valid these things are
25 happening, the next question would make you feel like you're

1 wrong. You did something wrong. When all I was doing was
2 fighting for something that was right. So it was awful. You
3 spent hours preparing for that, years going through it, and
4 then you set another date just to be humiliated.

5 Q. Ms. Smith, after your deposition, do you recall what the
6 next significant involvement you had in the case was?

7 A. I believe, certification or declaration, we had to
8 present that to -- in the grand scheme of things, it didn't
9 take as many hours, maybe two to six, but it was two, six
10 hours away from spending with the children that you haven't
11 been able to in the last eight years. It's hours, more hours.

12 Q. Do you recall what you did next in pursuit of this
13 litigation?

14 A. After the declaration, then came the class certification.

15 Q. Do you recall working with counsel regarding the
16 selection and analysis of their experts?

17 A. Yes.

18 Q. How much time would you say you spent on that?

19 A. Probably another five hours.

20 Q. And then you mentioned class certification. Did you
21 assist counsel in the preparation of the class certification
22 papers?

23 A. Yes.

24 Q. How much time would you say you spent on that?

25 A. Again, probably about the same.

1 Q. Do you recall what the next significant step was you took
2 in this litigation?

3 A. At that point, we may have -- I believe Merck then came
4 back to us and said that they were willing to settle.

5 Q. Okay. Tell me how the settlement process happened in
6 your recollection?

7 A. In the big picture, it happened pretty fast considering
8 the amount of months and years that had gone by. This
9 happened in September. And by October, we were to, on our own
10 time, fly out to San Francisco and get a hotel and meet them
11 prior to. There was a lot of conversation and dialog that
12 transpired between us and the -- my peers that were involved
13 with the case. And then we had to go to San Francisco, meet
14 with my attorneys, and then the next day we would sit down for
15 the mediation.

16 Q. Okay. And the mediation, do you recall about how long
17 that took?

18 A. That was a whole day, yeah.

19 Q. Can you tell me about the emotions that you had during
20 that day?

21 A. So, I was very calm and confident and tried to hold it
22 all in. As it goes back and forth, the numbers started at a
23 very high number, representing a lot of women, and you would
24 see it dwindle down, and it would make you feel as if you
25 weren't worth anything and everything you fought for wasn't

1 worth it. While you don't go for the end goal of the dollar
2 amount, you go to make a difference for all these women that
3 are there, and so at the very end, that was when we finally
4 came to a settlement, and I cried.

5 But you're alone. You're alone out there because you're
6 told you're not allowed to say anything. You're not allowed
7 to talk to anybody. You're not supposed to celebrate this.
8 It wasn't an exciting thing.

9 My family wasn't there because I had to pay for my own
10 flight back and forth. I needed somebody to take care of my
11 children and life back home. So you're there at the end of
12 this 10-year journey just saying, okay, it's over.

13 I don't know any of the other women that were a part of
14 this lawsuit. I know that they went through what I went
15 through, so it's not if I can celebrate with them.

16 Q. Ms. Smith, do you believe that the settlement that we
17 have, as a result of that mediation, is a good settlement for
18 the class?

19 A. Yes.

20 Q. Okay. Do you recommend that the Court approve it today?

21 A. Yes, please.

22 MR. KORNBLITH: Your Honor, I believe that's all I
23 have at this time.

24 THE COURT: Okay. Counsel, and perhaps you can
25 answer this. How much will Ms. Smith receive from the

1 settlement agreement as the class representative?

2 MR. KORNBLITH: There is a service payment for
3 Ms. Smith of \$25,000. And then there will be an allocation
4 based on the number of work weeks that she had in the
5 applicable class period. I actually don't know that number.

6 THE COURT: Ms. Smith, do you believe that this
7 number is fair?

8 MS. SMITH: Yes.

9 THE COURT: Are there any additional incentives or
10 bonuses that she will have beyond what you just indicated?

11 MR. KORNBLITH: Well, there is the individual
12 settlement agreement that we disclosed, but that is not an
13 incentive or a bonus, that's a separate agreement based on her
14 individual claims.

15 THE COURT: Okay. Ms. Smith, are you satisfied with
16 your counsel's representation and services provided to you in
17 this case?

18 MS. SMITH: Yes, sir.

19 THE COURT: Do you have any concerns relating to the
20 proposed settlement at all?

21 MS. SMITH: No.

22 THE COURT: Okay. Thank you.

23 And just out of fairness, I want to turn it over to
24 defense counsel to ask if you have anything that you need to
25 add for this Court's consideration at this time?

1 MS. KATENSTEIN: No, your Honor.

2 THE COURT: Okay. And I received the declarations
3 from other class representatives that are not here to attend
4 in person, and the Court has considered those.

5 I did not receive any objections or notices of
6 intentions to appear, but, nonetheless, the Court would like
7 to open the floor if there are any class members that are
8 present.

9 Are there any class members present? Seeing none. I
10 see one gentleman in the back --

11 MR. KORNBLITH: That's Mr. Smith, your Honor.

12 THE COURT: I kind of surmised that.

13 So, with that, I guess we move into the class counsel
14 attorneys' fees and expenses.

15 Having reviewed the proposed settlement agreement and
16 counsel's request for attorneys' fees and expenses, it is this
17 Court's understanding that the settlement agreement permits
18 class counsel to seek no more than \$3 million in attorneys'
19 fees and expenses and \$50,000 in settlement administration
20 costs. Class counsel seeks \$727,154.62 for reasonable
21 litigation expenses and \$2,272,845.38 in attorneys' fees. In
22 total, the attorneys' fees amount to 36.7 percent of the
23 common fund. And that's exclusive of the litigation expenses.

24 Counsel, just finally, if you can go through the fees
25 for me and just explain to me how the fees will be paid, what

1 the timing is, what the services included. Anything else you
2 want to put on the record as to the costs and expenses. How
3 many attorneys worked on the matter, the hourly rates, and any
4 other issues that the Court might need for resolving the issue
5 of the attorneys' fees in this matter.

6 MR. KORNBLITH: Yes, your Honor.

7 Let me start by saying this case, if the Court looks
8 at the docket, has been litigated now for, in this court, more
9 than six years or approximately six years. And in addition to
10 that, there was obviously a substantial lead up of two years
11 representing Ms. Smith before a class action was filed. So
12 the total trajectory of this litigation is approximately eight
13 years, which is a very long time.

14 We have an immense number of depositions, nearly 100,
15 many of which were scattered across the country, entailing
16 significant travel time. Speaking for Sanford Heisler alone
17 -- or, excuse me, speaking largely on the expenses, we have
18 over \$200,000 that was expended in pursuit of those
19 depositions across the country. We have over \$200,000 in
20 expert fees, between two experts and of course critiquing the
21 experts retained by defense counsel, and we've got over
22 \$150,000 of e-discovery costs comprising substantial docket
23 maintenance, docket searching, and docket processing needs,
24 including the documents of a 120 opt-in plaintiffs that had to
25 be collected, processed, reviewed and produced. We have

1 mediation costs that were in excess of \$20,000 in this case.

2 In terms of the hours, your Honor, we have over
3 23,000 hours expended by class counsel in pursuit of this
4 case. The hours per lawyer and the exact hourly rate appear
5 in the Sanford and Marcuse declarations, which were filed in
6 support of class certification, and the Court can see the
7 hourly rates there range from \$275 or \$295 for our legal
8 assistance at the low end to over \$800 for experienced
9 partners at the high end.

10 We have -- there are a few firms, I believe, in the
11 country that could have undertaken a litigation and a
12 discovery process this vast and this lengthy with no risk of
13 any payment at the end.

14 So, your Honor, we would respectfully ask that the
15 Court award the attorneys' fees and expenses as requested.
16 The attorneys' fees that we have requested represent, I
17 believe, approximately 17 percent of our total lodestar. So
18 we are not recouping over 100 cents on the dollar here.

19 THE COURT: Thank you, Counsel.

20 Let me hear from defense counsel. Any issue or
21 response to that?

22 MS. KATENSTEIN: Your Honor, we don't take any
23 position on plaintiffs' petition.

24 THE COURT: Okay. Anything else that the Court needs
25 to consider before making a final determination here?

1 From the plaintiffs' counsel?

2 MR. KORNBLITH: Not from plaintiffs' counsel, your
3 Honor.

4 THE COURT: Anything else from defense counsel?

5 MS. KATENSTEIN: No, your Honor.

6 THE COURT: Thank you.

7 Counsel, thank you for your testimony here today.

8 After considering plaintiffs' briefing, declarations
9 and correspondence of class counsel, class representatives,
10 and the claims administrator, as well as the testimony here
11 today, I am prepared to enter my findings and conclusions on
12 the record. Having reviewed plaintiffs' motion for final
13 approval of the class action settlement and all other
14 pleadings, documents, and testimony set forth on the record,
15 this Court is satisfied that the terms of the settlement
16 agreement are fair, reasonable, and adequate. Fed. R. Civ. P.
17 23(e)(2).

18 Specifically, this Court finds that the settlement
19 class meets all the necessary Rule 23(a) and (b) requirements
20 for certification and settlement purposes. The Court finds
21 that: (1) the proposed class is so numerous that joinder of
22 all members of the class is impracticable, Fed. R. Civ. P.
23 23(a)(1); (2) there are questions of law or fact that are
24 common to the class, Fed. R. Civ. P. 23(a)(2); (3) class
25 representatives Kelli Smith, Kandice Bross, Rachel Mountis,

1 and Kate Whitmer's claims are typical of the claims of the
2 other class members and they will fairly and adequately
3 protect class members' interests, Fed. R. Civ. P. 23(a)(3),
4 (4); (4) questions of law and fact common to class members
5 predominate over any questions affecting only individual
6 members, Fed. R. Civ. P. 23(b)(3); (5) this class action is
7 the superior method for efficiently adjudicating the claims
8 asserted, *id.*; (6) counsel have demonstrated that they are
9 qualified to serve as class counsel; and (7) notice to the
10 class has been properly and adequately provided to potential
11 class members in accordance with this Court's Preliminary
12 Approval Order and Rule 23, see Fed. R. Civ. P. 23(c)(2). The
13 Court, accordingly, certifies this class for the purposes of
14 settlement.

15 Additionally, the Court finds that final
16 certification of the Equal Pay Act Collective Action is
17 appropriate. The Court finds that the named plaintiffs are
18 similarly situated with the opt-in plaintiffs because they all
19 share similar employment settings and faced common employer
20 action. See *Zavala v. Wal Mart Stores Inc.*, 691 F.3d 527,
21 53637 (3d Cir. 2012).

22 As for the proposed settlement, the Court is
23 satisfied that the settlement agreement, as outlined by
24 counsel on the record, is fair, reasonable, and adequate to
25 the class members in light of the complexity, expense, and

1 duration of this litigation and the risks involved with going
2 to trial and demonstrating liability and damages. As
3 supported by counsel's showing on the record and in briefing,
4 the proposal was negotiated at arm's length, see Fed. R. Civ.
5 P. 23(e) (2) (B); there would be significant costs, risks, and
6 delay if this case were taken to trial, see Fed. R. Civ. P.
7 23(e) (2) (C) (i); the proposed settlement treats class members
8 equitably relative to each other by paying class members based
9 on weeks worked, see Fed. R. Civ. P. 23(e) (2) (D); the proposed
10 settlement automatically distributes funds to the class
11 members without requiring an onerous claims process, see Fed.
12 R. Civ. P. 23(e) (2) (C) (ii); and agreements made with class
13 representatives in connection with the proposal do not raise
14 concerns that the proposed settlement was improperly
15 negotiated or agreed to, see Fed. R. Civ. P. 23(e) (2) (C) (iv).
16 The Court also finds that \$50,000 for the purpose of claims
17 administration and distribution of class funds is fair and
18 reasonable.

19 Moreover, this Court finds that the following service
20 awards are fair and reasonable based on the surrounding
21 circumstances and complexity of this matter:

22 1. \$25,000 each to class representatives Ms. Smith,
23 Ms. Bross, Ms. Mountis, and Ms. Whitmer;

24 2. \$4,000 each to the 66 collective action members who
25 were deposed;

1 3. \$1,000 each to the 55 collective action members who
2 submitted written discovery but who were not deposed;

3 4. \$1,000 to the collective action member who
4 submitted a declaration but who was not deposed; and

5 5. \$100 each to the 547 opt-in collective action
6 members who did not participate in discovery and did not opt
7 out of the settlement.

8 Likewise, based on Class counsel's request for an award
9 of attorneys' fees and reimbursement of expenses, as well as
10 the testimony heard by this Court today, the Court finds that
11 the requested \$727,154.62 in expenses and \$2,272,845.38 in
12 attorneys' fees are also fair and reasonable. Fed. R. Civ. P.
13 23(e)(2)(C)(iii). The Court notes, and finds persuasive, the
14 absence of objections from the class to the settlement terms
15 or attorneys' fees, the complexity and duration of the
16 litigation, the risk of nonpayment faced by class counsel, and
17 the amount of time devoted to the case by class counsel. See
18 *Gunter v. Ridgewood Energy Corp.*, 223 F.3d 190, 195 n.1
19 (3d Cir. 2000). Class counsel devoted over 23,000 hours to
20 this litigation and requested attorneys' fees amount to 17.1%
21 of the lodestar. (Sanford Decl. ¶ 24, ECF No. 437; Marcuse
22 Decl. ¶ 25, ECF No. 438; Kornblith Decl. ¶ 60, ECF No. 436);
23 see *In re New Jersey Tax Sales Certificates Antitrust Litig.*,
24 No. 12-1893, 2016 WL 5844319, at *11 (D.N.J. Oct. 3, 2016).

25 Accordingly, the Court approves the Class Settlement

1 Agreement and grants Class counsel's Motion for Attorneys'
2 Fees, Costs, and Service Awards. An order consistent with
3 this opinion will issue later today.

4 With that, Counsel, all I can say is that, I have been
5 on this bench as a district court judge for seven years. This
6 is one of my first cases that I had when I came on the bench.
7 I was a magistrate judge for five years prior to that, so
8 suffice it to say that this Court is equally happy to see this
9 matter resolve and to see this -- to see everyone move on with
10 their lives.

11 So, Ms. Smith, certainly, I don't know that we say
12 congratulations, but I'm certainly happy that you will move on
13 with your life and put this matter behind you.

14 And to the parties, both counsel, I just think you all
15 did a great job at least professionally trying to bring this
16 about -- some kind of closure as early as you possible could.
17 I understood you kind of lived with this matter through
18 motions and through many of the litigation phases that you
19 went through, so I certainly know that the numbers here are
20 appropriate and that in fact they probably could have been a
21 lot different. But due to the professionalism of the
22 attorneys here, I believe that you folks were able to bring
23 this in and get it resolved as best you could on both sides.

24 So, with that, congratulations, and that's all we have.
25 I'll issue an order, and we'll try and get this wrapped up.

1 MR. KORNBLITH: Thank you, your Honor.

2 MS. KATENSTEIN: Thank you, your Honor.

3 THE DEPUTY COURT CLERK: All rise.

4 (Court concludes at 11:43 a.m.)

5

6 FEDERAL OFFICIAL COURT REPORTER'S CERTIFICATE

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10 I certify that the foregoing is a correct transcript from
11 the record of proceedings in the above-entitled matter.

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18 /s/ CATHY J. FORD, CCR, CRR, RPR

January 15, 2020

19 Court Reporter

Date

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